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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. JUSTIN MITCHELL ALLARD, Defendant and Respondent.	G051926 (Super. Ct. No. 13WF2315) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frances Munoz, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part and remanded for resentencing.

Tony Rackauckas, District Attorney, and David R. Gallivan, Deputy District Attorney, for Plaintiff and Appellant.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Respondent.

We are called upon here to determine the legality of defendant Justin Mitchell Allard's sentence. Because he intentionally discharged a firearm while committing a robbery, defendant Allard was subject to a mandatory sentence enhancement of 20 years in prison under Penal Code section 12022.53, subdivision (c).[1] However, the trial court decided not to impose that penalty on the grounds it would be cruel and unusual. Instead, the court imposed a four-year enhancement for personally using a firearm during a felony under section 12022.5, subdivision (a). Thus, rather than receiving a decades-long prison term, defendant was sentenced to a total term of eight years.

We do not believe an eight-year sentence is unreasonable under the circumstances presented in this case. However, in considering the People's appeal of that sentence, reasonableness is not the issue: We must determine whether, *as a matter of law*, the Constitution *compels* a departure from the statutorily mandated punishment. Exercising our independent judgment on that question, we conclude the answer is no. We therefore reverse the judgment insofar as defendant's sentence is concerned and remand the matter for resentencing In all other respects, we affirm.

FACTS

Defendant was born in 1986. He grew up in a loving and supportive family and experienced few problems as a child. He was, however, a bit hyperactive. That did not prevent him from excelling in athletics, but schoolwork was a challenge. In the fifth grade, defendant was prescribed Ritalin, which is used to treat Attention Deficit and Hyperactivity Disorder (ADHD), and upon entering high school, he started drinking alcohol and using drugs. By the time defendant was 15 years old, he was on juvenile probation for possessing marijuana and pulling a knife on a fellow student at school.

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1 All further statutory references are to the Penal Code.

Hoping to set defendant straight, his parents sent him to reform/drug rehabilitation schools in Mexico and Jamaica. However, the strict treatment defendant received there did little to curb his delinquency.[2] Upon returning to his family in Orange County, defendant was expelled from Valley Christian High School for smoking marijuana and drinking. He then started using cocaine and got addicted to prescription painkillers after punching his fist through a wall at a party. By that time, defendant was 18 years old, and his parents decided to adopt a "tough-love" approach toward him. Defendant responded by moving out of their house and spending the next year and a half partying with his friends.

In 2006, at the age of 19, defendant entered a residential drug treatment program in Costa Mesa. He did well in the program initially, but his roommate there introduced him to heroin, which led to further problems. Defendant was not only dismissed from the program, he proceeded to commit a series of low-level crimes (trespassing, drug possession and driving without a license) for which he was again placed on probation. During this period, defendant attended some Narcotics Anonymous meetings, but he eventually stopped going to them because he did not like being around recovering addicts. Defendant was also convicted of commercial burglary – which triggered another probationary period – for picking up an opiate prescription at a drug store without the permission of the person to whom it was prescribed.

In the wake of his burglary conviction, defendant, then age 24, started to improve his behavior. In fact, over the next few years, defendant completed a drug treatment program, worked steadily in the restaurant business and began associating with

[2] According to defendant's mother, defendant was "a little traumatized" when he came home from school abroad because his foreign instructors were so stern with him. Apparently, they sometimes made defendant sleep on the floor and deprived him of snacks if he failed to follow their rules.

non-drug users. Defendant also met and moved in with his girlfriend Reyna D., who was a positive influence on him. Although he continued to drink socially during this period, there is no evidence he was involved in any illegal drug use.

Just as defendant was beginning to turn his life around, his grandmother suffered a relapse in her battle with cancer and was moved into defendant's parents' house in Orange County. Defendant was close to his grandmother and visited her often. He was devastated when she passed away on July 22, 2013. At that time, defendant was 27 years old and had been drug-free for about three years. However, following his grandmother's death, he "fell back into a deep hole" and went on an extended, drug-fueled crime spree.

Defendant's crime spree started on July 24, 2013, two days after his grandmother died. That evening, Reyna saw defendant take a handful of pills as they were getting ready for bed. When she asked what was going on, defendant said he had been addicted to drugs for years but never informed her of that. Reyna made it clear she did not like the idea of defendant using drugs, however, he told her she "just had to deal with it."

Reyna disagreed. The next morning she told defendant she did not want to live with a drug addict. Defendant became very upset. As she was leaving the apartment, he tackled her in the hallway, and when she started to scream, he put his hand over her mouth and threatened to snap her neck if she did not shut up. He also threatened to shoot her parents and the police if she called them and they came to the apartment. (Although defendant was a convicted felon, he had amassed a small collection of firearms in the months leading up to this altercation. The guns were in plain view in the living room throughout his violent tirade.) Eventually, defendant let Reyna leave the apartment without further incident, and she did not report him to the police for fear that he would kill her.

Two days later, on July 27, 2013, defendant drove to a pawnshop in Placentia. Video surveillance of the pawnshop shows defendant entered the premises at 12:45 p.m. while wearing a baseball hat, dark sunglasses and gloves. He also had a bandana over his face and was holding a loaded revolver. Pawnshop employee Richard Pulido was the only person in the shop at the time. He was seated about 20 feet away from defendant, behind a layer of bullet-proof glass. Speaking to Pulido from just inside the front door, defendant yelled out, "Are you ready? Are you ready? Do you think I'm fucking playing?" Defendant then turned away from Pulido and fired a shot into a glass display case that was located a few feet to his right.[3] The bullet made a small hole in the glass that defendant widened with the barrel of his gun. Then he reached into the case, grabbed a bar of silver and fled the scene. Although defendant was only inside the shop for 17 seconds, the shooting left Pulido extremely frightened and distraught. From that day on, Pulido was very nervous working at the pawnshop, and eventually he quit working there altogether.[4]

Defendant made a clean escape from the pawnshop. But, the next day he got into a car accident while driving in Seal Beach.[5] Before the police arrived at the accident scene, defendant fled to a nearby motel, checked into a room and changed his clothes. He called Reyna and warned her he was armed and prepared to shoot anyone who tried to take him in. However, he eventually left the room and was peacefully arrested in the lobby of the motel.

At the time of his arrest, defendant appeared to be under the influence of drugs and/or alcohol. He denied any criminal wrongdoing, but when the police searched

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[3] In their statement of facts, the People claim defendant fired the revolver "in a direction toward Pulido[.]" That would be true if we defined the words "direction" and "toward" in exceedingly broad terms. But it would be more accurate to say defendant fired "down and away" from where Pulido was situated. The shot could not possibly have hit Pulido directly, even if he had not been protected by bullet-proof glass.

[4] Pulido's decision to quit his job at the pawnshop coincided with his receipt of a subpoena to appear in court for this case.

[5] At the time of the accident, defendant was driving a car that belonged to Natasha C., a friend of Reyna. He did not have Natasha's permission.

his motel room, they found the silver bar from the pawnshop along with various prescription medications and two loaded handguns. One of the handguns belonged to defendant's father, who was a police officer himself. Investigators subsequently discovered that defendant had not only stolen firearms from his father, he had taken checks, credit cards and cash from Reyna and her family without their permission.

PROCEDURAL BACKGROUND

Defendant was charged with robbery, shooting at an occupied building, unlawful vehicle taking, unlawful gun possession, criminal threats, aggravated assault, check fraud, driving under the influence, and hit and run. It was also alleged defendant came within the terms of section 12022.53, subdivision (c). That provision calls for a mandatory sentence enhancement of 20 years in prison whenever the defendant intentionally discharges a firearm during the course of a serious felony such as robbery.[6]

Defendant initially pleaded not guilty to all the charges. However, early on in the proceedings, even before the preliminary hearing was conducted, defendant signaled a willingness to plead guilty and accept responsibility for his actions. While defendant showed no interest in contesting the charges, he was concerned about his potential punishment. Given the mandatory 20-year gun discharge enhancement, defendant was looking at a minimum sentence of 22 years in prison, with only a 15 percent reduction for conduct credit. His attorney argued imposing that term would be a constitutionally unjust and disproportionate penalty compared to the crime defendant committed. In lieu of that term, defense counsel urged the court to strike the gun discharge enhancement pursuant to the Eighth Amendment and sentence defendant to probation on the condition he complete a long-term drug program.

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[6] Unlike other penalty provisions, the gun discharge enhancement may not be stricken pursuant to "[s]ection 1385 or any other provision." (§ 12022.53, subd. (h).)

In conjunction with this request, defense counsel filed a pre-plea sentencing report that was prepared by a private sentencing consultant who was hired by the defense and that included reference letters from defendant's friends and family. The consultant suggested defendant's criminal behavior was attributable to "a gross failure by the system to recognize, diagnose and address" his behavioral and drug problems. The consultant proposed that, rather than impose the "Draconian" sentence mandated by the Penal Code, the court should allow defendant "to participate in an appropriate long term residential treatment program where he would be exposed to [the tools that would] enable him to cope with adversity in far more reasonable manner" than he was able to do in this case.

For its part, the prosecution opposed any departure from the statutorily mandated sentence. Considering defendant's conduct and the danger he created by virtue of firing a gun inside a commercial establishment, the prosecution contended a 22-year sentence was not unconstitutional.

Even though the court believed defendant's actions were "rather egregious" and could not easily be explained by his drug addiction, it said it would be willing to entertain his claim that a 22-year sentence constituted cruel and unusual punishment. However, not having heard any evidence in the case, the court felt it needed more information about defendant and his crimes in order to make an informed decision on that issue. Therefore, after defendant pleaded guilty to the charges and admitted the gun discharge enhancement, the court conducted a lengthy sentencing hearing.

At the hearing, the prosecution presented evidence from defendant's victims and the police officers who investigated his crimes. (That testimony is set forth in the facts above.) Defendant did not testify at the hearing, but he did call several witnesses who vouched for his good character and said he has shown remorse and increased maturity since his incarceration. In addition, the defense called psychiatrist Itai

Danovitch, who opined that defendant suffers from substance abuse disorder.[7] Danovitch said drug use impairs a person's ability to use good judgment, and most addicts need several years of intensive treatment before they can achieve enduring recovery. Danovitch also testified that recovering addicts are susceptible to relapse when they experience a traumatic event, such as the loss of a loved one.

Following the hearing, the court received further briefing from the parties and a sentencing report from the probation department. In recommending against a grant of probation, the probation officer noted that while defendant appeared to be remorseful when he interviewed him in custody, he deserved to be imprisoned for his criminal conduct. However, the probation officer did not offer an opinion as to how much prison time defendant deserved.

In the end, the trial court determined that imposing the statutorily mandated 20-year gun discharge enhancement pursuant to section 12022.53, subdivision (c) would amount to cruel and unusual punishment. Therefore, the court struck that enhancement and sentenced defendant under section 12055.5, subdivision (a), which requires a sentence enhancement of 3, 4 or 10 years whenever the defendant personally uses a firearm during the commission of a felony. The court sentenced him to four years on the underlying counts, comprising three years for robbery and one year for aggravated assault, with all other counts running concurrently to these terms, and it chose the midterm of four years on the gun use enhancement, bringing defendant's aggregate sentence to eight years in prison.

DISCUSSION

The People contend the trial court erred in striking the 20-year gun discharge enhancement on the grounds it constituted cruel and unusual punishment. We agree.

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[7] Danovitch did not personally interview or evaluate defendant. He formed his opinions based on information provided to him from defense counsel and defendant's family.

Trial courts generally have broad discretion in imposing sentence, and because of that, our role in reviewing sentencing decisions is typically quite limited. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [unless the trial court's sentencing decision is irrational or arbitrary, its discretionary determination to impose a particular sentence will not be disturbed on appeal].) However, these principles do not apply when the constitutional prohibition against cruel and unusual punishment is at issue.

As our colleagues in Division One have explained, "Reducing a sentence [on cruel and unusual grounds] 'is a solemn power to be exercised sparingly only when, as a matter of law, the Constitution forbids what the sentencing law compels.' [Citation.] The reduction of a sentence because it is cruel or unusual "'must be viewed as representing an exception rather than a general rule.'" [Citations.] 'In such cases the punishment is reduced because the Constitution compels reduction, not because a trial court in its discretion believes the punishment too severe.' [Citation.] Deciding that a punishment is cruel or unusual . . . presents a question of law subject to independent review; it is 'not a discretionary decision to which the appellate court must defer.' [Citation.]" (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000.) With that in mind, we now turn to the legal standards applicable in this case.

Both the California and United States Constitutions prohibit the imposition of cruel or unusual punishment. (See U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) However, successful challenges based on that prohibition are extremely rare. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196 ["exquisite rarity"].) Absent gross disproportionality in the defendant's sentence, no Eighth Amendment violation will be found. (*Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63.) Similarly, a sentence will not be found unconstitutional under the state Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (*People v. Dillon* (1983)

34 Cal.3d 441; *In re Lynch* (1972) 8 Cal.3d 410, 424.) Although we are sympathetic to the fact defendant's conduct calls for a severe sentence, we do not believe the imposition of the 20-year gun discharge enhancement is constitutionally prohibited under the facts of this case.

Turning first to the nature of defendant's primary offense – intentional discharge of a firearm during the course of a robbery – the parties are in disagreement as to whether the fact that victim Pulido did not sustain any physical injury during the robbery is a relevant consideration in the proportionality analysis. Defendant argues the severity of his conduct is mitigated because Pulido was not injured or at risk of being injured by his gun discharge, and the People assert, "The lack of physical injury to [Pulido] is not a factor to consider in assessing whether the punishment for [defendant's] crime is constitutional." Our Supreme Court has spoken on this issue and made clear that in assessing sentence proportionality we must not only look at the subject offense in abstract terms but in light of the particular circumstances under which it was committed. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) Those circumstances include the crime's "motive, the way it was committed, the extent of the defendant's involvement, *and the consequences of his acts*." (*Ibid*., italics added.) Thus, it is a favorable circumstance for the defendant that Pulido was not physically harmed during the robbery.

However, while Pulido did not sustain physically injury, he was clearly and unsurprisingly traumatized by defendant's gun use. On the surveillance video he can be heard screaming hysterically during the shooting, and afterwards he was so nervous and upset he could barely talk. The fact he quit working at the pawnshop right around the time he was subpoenaed to testify suggests the shooting was still exerting a considerable emotional and psychological effect on him.

In evaluating the seriousness of defendant's actions, we must also be mindful that the gun enhancement provisions found in section 12022.53 are designed to protect the public and deter violent crime. With those compelling state interests in mind,

courts have consistently upheld the statute against facial challenges that it violates the proscription against cruel and unusual punishment. (See, e.g., *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214-1215 and *People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498, which discuss the many dangers associated with the illegal use of firearms.)

In this case, it seems fairly obvious that defendant did not want to hurt anyone when he fired his gun during the pawnshop robbery, but his conduct was so wantonly reckless and dangerous that it cannot be dismissed as a minor transgression. Defendant was, after all, a full grown adult at the time of the shooting (27 years old), and it is clear he acted in a purposeful, premeditated fashion, without any provocation. Defendant was not a youthful and inexperienced offender who committed an unintended offense after being swept up in unexpected circumstances. (Compare *People v. Dillon, supra*, 34 Cal.3d at pp. 487-488 [reducing a 17-year-old's punishment for felony murder because, inter alia, the crime "was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger" and because the defendant "had no prior trouble with the law."]; see also *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] [cataloging the characteristics of juvenile offenders that generally make them less culpable for criminal activity than adults].)

Defendant's criminal record is actually quite extensive, with a pronounced trend toward increasingly serious offenses. Whereas his early crimes were relatively minor, defendant pulled off a burglary in 2010, and his current crimes reflect a degree of dangerousness and sophistication that is typically associated with hardened criminals. Of course, in many ways, defendant does not fit the profile of a hardened, malicious offender; that is the crux of his appeal for leniency. Defendant wants us to consider "that at the time of the crime in the pawn shop he was unstable, lacking judgment and acting out of pain and anger. His mental state was the direct product of his relapse into use of drugs and his emotional devastation at the loss of his grandmother."

Defendant's history of drug addiction and his grandmother's death are relevant considerations in evaluating his culpability in this case. But even before defendant's grandmother died and he fell off the wagon, he was violating the law by feloniously possessing firearms and stealing from Reyna's family.

Addiction and personal loss are a part of many peoples' lives. As the trial court observed early on in the case, they are not circumstances that typically cause people to go off on violent, extended crime sprees. This is true even though many people do not have the level of care and support that defendant has enjoyed throughout his life. Unlike most drug addicts, defendant was raised in a loving family that had both the inclination and the means to get him help for his problems. When he had difficulties associated with ADHD in grade school, his mother, as defendant recognizes, helped him "work[] through those problems." And when defendant's behavioral and drug issues surfaced later on, his parents sent him to private schools and rehabilitation facilities for intensive care and treatment. Indeed, the record reflects defendant has attended over half a dozen drug treatment programs, including a residential program here in Orange County. Despite being afforded ample opportunity to do so, defendant has simply failed to overcome the temptation to indulge in illegal drug activity. That failure, while unfortunate, does not constitute a sufficient justification to depart from the statutorily mandated punishment.

Defendant argues a 20-year sentence enhancement for discharging a gun during a robbery is disproportionate when compared to the penalty for the same conduct in other states and as compared to other sentence enhancing conduct in this state. (See *Ewing v. California, supra,* 538 U.S. at p. 22 [in assessing proportionality courts may undertake an interstate comparison of sentences for the same crime and an intrastate comparison of sentences for other crimes]; *In re Lynch, supra,* 8 Cal.3d at p. 427 [same].) California's gun enhancement laws are tough, to be sure. But the punishment for discharging a firearm during a robbery in this state is on par with other jurisdictions. (See, e.g., Fla. Stat. Ann. § 775.087, subd. (2)(a)(1), (2) [requiring minimum sentence of

20 years in prison if the defendant discharges a firearm while committing robbery]; 720 Ill. Stat. § 5/18-2, which was effectively revived by Pub. Act 95-688 as stated in *People v. Blair* (Ill. 2013) 986 N.E.2d 75 [mandating 20-year sentence enhancement for discharging firearm during armed robbery]; La. Code Crim. Pro., art. 893.3, subd. (E)(1)(a),(b) [subject to constitutional limitations respecting excessive punishment, any person who discharges a firearm in the course of an armed robbery shall be imprisoned for at least 20 years]; see also 18 U.S.C. § 924 (c)(1)(B)(ii) [requiring minimum sentence of 30 years for using a silencer-equipped firearm during a violent crime].) And although two decades in prison is certainly a severe penalty for an enhancement, the punishment is comparable to the sentence prescribed under other enhancement-related statutes in California. (See, e.g., § 186.22 subd. (b)(4) [a defendant convicted of extortion, dissuading a witness or shooting at an inhabited building shall receive an indeterminate life sentences if the crime was committed for the benefit of a criminal street gang].)

There is room for debate over the wisdom and efficacy of mandatory sentencing laws like the one at issue in this case. (See Lizotte & Zatz, *The Use and Abuse of Sentence Enhancement for Firearms Offenses in California* (1986) 49 Law and Contemporary Problems 199.) But formulating the appropriate punishment for criminal conduct is a uniquely legislative function that is subject to judicial intervention in only the rarest of circumstances, and those circumstances simply do not present themselves in this case. All things considered, we do not believe subjecting defendant to 20 years in prison for discharging a firearm during the course of a robbery is cruel or unusual under the state or federal Constitutions. Therefore, the trial court's ruling to the contrary cannot stand, and defendant must be resentenced in accordance with the statutes he violated, including section 12022.53.[8]

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[8] In light of this conclusion, we need not consider the People's secondary argument that the trial court unlawfully infringed the prosecution's charging prerogative by substituting a section 12022.5 enhancement for the section 12022.53 enhancement that was alleged and admitted in this case.

DISPOSITION

That portion of the judgment that comprises defendant's sentence is reversed, and the matter is remanded for resentencing in accordance with the terms prescribed by statute. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.